IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JEANNE BURKEY	:	CIVIL ACTION
	:	
v.	:	
	:	
MARY A. BURKEY	:	NO. 97-1362

M E M O R A N D U M

Ludwig, J. May 14, 1998

Defendant Mary A. Burkey moves for a new trial. Fed. R. Civ. P. 59(a)(2).

On February 24, 1997 plaintiff Jeanne Burkey, defendant's daughter, filed this negligence action in diversity, 28 U.S.C. § 1332(a) (1994), for personal injuries occasioned by a fall on the steps outside defendant's house.[1] On March 3, 1997 an amended complaint was filed, and on March 6, personal service was made.[2] On April 4, 1997 a default was entered against defendant for failure to plead or otherwise defend. On April 22, 1997 an order was entered[3] scheduling a hearing to assess damages on May 28, 1997. On the day of the hearing, defendant appeared through counsel and moved to open the default. Subsequently, the motion was denied, and, by agreement of the parties, the issue of damages was submitted to arbitration. On September 12, 1997 appealing de

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[1] The fall on March 11, 1997 is alleged to have resulted in a forehead scar three to five centimeters in length — about two inches. Tr. at 19-20, Nov. 6, 1997.

[2] In addition, a courtesy copy of the original complaint had been received by defendant's insurer in February, 1997. Defendant's memorandum, at 6.

[3] A copy of the order was received by an attorney for defendant's insurer on April 28 and by defendant on April 30, 1997.

novo from the arbitration award, defendant filed a request for a jury trial. On October 6, 1997 this request was denied, on the ground that the right to a jury trial had been waived. Fed. R. Civ. P. 38(d). On November 6, 1997 a non-jury trial was held, and a verdict and judgment for plaintiff in the amount of $100,000 were entered.

Defendant's motion for new trial alleges: (1) abuse of discretion in the refusal to open the default and (2) in the denial of defendant's request for a jury trial upon her appeal of the arbitration award; (3) error in taking "judicial notice . . . [of the] permanency" of the scar without the aid of expert testimony, defendant's memorandum, at 10; and (4) the amount of the verdict was excessive. Id. at 5.

1. Refusal to open default — A defendant attempting to open a default must show good cause under Fed. R. Civ. P. 60(b).[4] See Fed. R. Civ. P. 55(c). Ordinarily, judgments taken by default, particularly so-called "snap judgments," are disfavored; the decision to open a default is a matter of judicial discretion. See Harad v. Aetna Casualty and Surety Co., 839 F.2d 979, 982 (3d Cir. 1988). Four factors should be considered in the exercise of that discretion: whether (1) opening the default would prejudice plaintiff; (2) defendant has a meritorious defense; (3) the default

[4] Rule 60(b): "On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for . . . any . . . reason justifying relief from the operation of the judgment."

and steps taken to remove it are excusable; and (4) possibility of effective alternative sanctions. See Emasco Insurance Co. v. Sambrick, 834 F.2d 71, 73 (3d Cir. 1987). A motion to open a default is directed to the equitable power of the court, which may refuse the requested relief if one or more of these factors is present. See Hoxworth v. Blinder Robinson & Co., Inc., 980 F.2d 912, 919 (3d Cir. 1992).[5]

Defendant has not demonstrated a meritorious defense. "The showing of a meritorious defense is accomplished when allegations of defendant's answer,[6] if established at trial, would constitute a complete defense to the action." United States v. $55,518.05 in U.S. Currency, 728 F.2d 192, 195 (3d Cir. 1984) (internal quotations and citation omitted). Defendant must assert specific facts – i.e., more than a general denial – to provide a basis for determining whether there is a prima facie meritorious defense. See Harad, 839 F.2d at 982; $55,518.05 in U.S. Currency, 728 F.2d at 195. Here, the motions to open and for a new trial aver in general terms that plaintiff's claim is barred by

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[5] As relates to this case, "lack of prejudice [to plaintiff] . . . is not, by itself, sufficent to warrant the setting aside of the default." Angelo Brothers Co. v. A & H Company, C.A. No. 96-2507, 1996 WL 571720, at *2 (E.D. Pa. Oct. 7, 1996) (quoting Billy Steinberg Music v. Bonin, 129 F.R.D. 488, 489 (M.D. Pa. 1990)). Also, "alternative sanctions" would not appear to be appropriate or helpful.

[6] Since defendant did not answer the complaint, the allegations in the motions to open the default and for a new trial will be considered to determine the existence of a meritorious defense. See Angelo Brothers Co., 1996 WL 571720, at *4 n.3.

comparative negligence or assumption of risk. Memorandum in support of motion to open default, at 3; memorandum in support of motion for new trial, at 6-7. Without a proffer of specific facts, defendant cannot effectively claim to have a prima facie meritorious defense. See Breuer Electric Manufacturing Co. v. Toronado Systems of America, Inc., 687 F.2d 182, 186 (7th Cir. 1982) (showing of meritorious defense requires more than "bare legal conclusions").

Moreover, a critical factor is whether or not defendant's default conduct is excusable. The order-memorandum of June 25, 1997, which denied the motion to open the default, contains the findings and conclusion on this issue. The reasons adjudicated for the refusal to open were defendant's unexplained failure to defend leading up to the entry of the default, together with the subsequent protracted tardiness. Defendant first communicated with the court by filing the motion to open the default on the morning of the assessment of damages hearing, May 28, 1997 — 86 days after service of the amended complaint and 54 days after entry of the default. Order, June 25, 1997. The defense presented no explanation at that time — nor since — to account for its inaction. Id. at 2. No claim has been made of lack of notice or of improper service of the complaint, or of negligence or confusion.[7] The

[7] According to defendant's memorandum, counsel was not retained until May 23, 1997. Memorandum at 7. Plaintiff's unchallenged response asserts, however, that on April 7, 1997 — three days after the default and 51 days before the assessment hearing at which an appearance was entered — an attorney for the (continued...)

defense should not benefit from its total silence on both its initial failure to defend and its lack of a timely effort to set aside the default.

Given these circumstances, the default judgment will not be opened.

2. Demand for jury trial – Defendant's first demand for a jury trial was made on September 12, 1997, after the arbitration hearing on damages and more than five months after the entry of default. On October 6, 1997 the demand was denied because of waiver under Fed. R. Civ. P. 38(d). A trial by jury must be demanded "not later than 10 days after service of the last pleading directed to such issue." Fed. R. Civ. P. 38(b). The effect of the entry of default was to terminate the pleadings until such time as the default was opened, which did not occur. Nevertheless, the defense could have proffered a demand for jury trial or an answer containing such a demand when counsel first came into the case. It also could have moved to vacate the waiver. Instead, without an explanation for the delay, it filed, and relies on, an untimely demand.

The argument that defendant is entitled to a jury trial under E.D. Pa. Local Rule 53.2(7)(B) is without merit. Memorandum, at 7. Rule 53.2(7)(B) states that upon demand for a trial de novo

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[7](...continued)
insurer contacted plaintiff's counsel about the case. Response, at 7. This lapse of time also remains undisputed and unexplained. Furthermore, the insurer's attorney was aware of the lawsuit as early as February, 1997. See supra note 2.

after an arbitration award is entered, "[a]ny right of trial by jury which a party would otherwise have shall be preserved inviolate" (emphasis added). The purpose of this Rule is to make clear that submitting a case to a non-jury arbitration does not constitute a jury trial waiver. The word "otherwise" shows that it is not intended to toll the jury trial demand time requirements of Fed. R. Civ. P. 38(b); nor could it do so.

3. Judicial notice; permanency of the scar; expert testimony — Defendant contends that it was error to take judicial notice of the permanency of plaintiff's scar without expert testimony. Memorandum, at 10. However, it is a distortion to say that judicial notice was taken or that there was a finding of permanency. Tr. at 27, Nov. 6 1997.

> THE COURT (as fact-finder): Without deciding whether the scar is permanent, it has been in existence now since March of 1995 or a little over two and a half years and does not appear to be substantially diminished from what appears in the photographs of plaintiff received into evidence. . . . The scar is a very obvious and unsightly one, and the Court finds that it will remain at least for the foreseeable future.

Id. at 28. Expert testimony is not required for such a fact finding. Defendant has not offered any authority for this assertion. On the contrary, our Court of Appeals has instructed:

> [E]xpert testimony not only is unnecessary but indeed may be properly excluded in the discretion of the trial judge if all the primary facts can be accurately and intelligibly described to the jury, and if they, as men of common understanding, are as capable of comprehending the primary facts and of drawing correct conclusions from them as

> are witnesses possessed of special training, experience, or observation in respect to the subject under investigation"

Wilburn v. Maritrans GP Inc., C.A. No. 97-1012, 1998 WL 100551, at *7 (3d Cir. Mar. 10, 1998) (quoting Salem v. United States Lines Co., 370 U.S. 31, 35, 82 S. Ct. 1119, 1122, 8 L. Ed.2d 313 (1962)) (internal quotations omitted).

Here, a fact-finder of "common understanding" could comprehend based on plaintiff's testimony and the photographic evidence presented — as well as the lack of rebuttal evidence or evidence of failure to mitigate damages, tr. at 28, Nov. 6, 1997 — that the scar would remain for the foreseeable future. See Fretts v. Pavetti, 282 Pa. Super. 166, 175, 422 A.2d 881, 885 (1980) (factfinder may consider future pain and suffering as element of damages upon competent testimony demonstrating likelihood that condition will persist into future; expert testimony not required).

4. Amount of the verdict — Considering plaintiff's injuries including pain and suffering and, in particular, the unsightliness of the large facial scar on a 44-year old otherwise attractive appearing person, the amount of damages awarded — $100,000 — is reasonable and not excessive.

Grounds for a new trial have not been shown. An appropriate order follows.

Edmund V. Ludwig, J.

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O R D E R

AND NOW, this 14th day of May, 1998 the motion of defendant Mary A. Burkey for a new trial is denied. Fed R. Civ. P. 59(a)(2). A memorandum accompanies this order.

Edmund V. Ludwig, J.